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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CODY KYLE KAHN, Defendant and Appellant.	G050574 (Super. Ct. No. 11NF3650) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, W. Michael Hayes, Judge. Reversed in part and affirmed in part.

Sharon M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, Kristen Chenelia and Christine Levingston Bergman, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Cody Kyle Kahn appeals following his conviction on charges of robbery, aggravated kidnapping, false imprisonment by violence, having a firearm in his vehicle, and carrying a loaded, unregistered firearm. He was sentenced to a term of 10 years, followed by an indeterminate term of life with the possibility of parole.

Defendant argues his conviction must be overturned because the prosecutor engaged in misconduct by advising the victim, incorrectly, that the court order allowing the defense investigator access to the crime scene – the lobby of an Anaheim hotel – was limited to one day, thereby thwarting defendant's ability to complete his trial preparation, and by thereafter sending her own investigator to the scene to address the same issue she knew the defense investigator had intended to explore, without disclosing that investigation to defendant.

Defendant also argues: (1) the evidence was insufficient to support his conviction for aggravated kidnapping because the movement of the victim was not substantial; (2) the search of his cell phone, incident to his arrest, violated his rights under the Fourth Amendment and consequently the evidence obtained from that search should have been suppressed; and (3) the use of CALCRIM No. 376 violated his right to due process because it invited the jury to convict him of kidnapping and robbery on only slight evidence.

We conclude the prosecutor engaged in misconduct, whether or not intentional, when she misrepresented the content of the court order allowing the defense investigator access to the crime scene. And by doing so, she hindered the defendant's preparation of his case. That being said, however, we find the misconduct was not prejudicial, and thus does not warrant a reversal of the judgment.

As to defendant's other claims, we reject his assertion regarding the cell phone evidence because the phone's search was authorized under California law at the time it was conducted, and thus there is no deterrent effect in suppressing the evidence obtained. And we find no error in the trial court's use of CALCRIM No. 376. What the

instruction actually does is prohibit the jury from basing a conviction *solely* upon evidence that a defendant knowingly possessed stolen property, and the fact it allows a conviction based on only slight *additional* evidence is not a denial of due process. However, we agree with defendant's contention the evidence was insufficient to support his conviction for aggravated kidnapping because moving the victim from the area behind the hotel's front desk to an adjacent hallway was merely incidental to the robbery and did not increase the risk of harm to him.

FACTS

This case involves a robbery carried out at the Desert Palms Hotel in Anaheim, where defendant was employed from August 2008 until he was fired in January 2010. Both during and after the period of defendant's employment, the hotel offered tickets to Disneyland, Knott's Berry Farm, and Universal Studios for sale to its guests. The tickets were kept in folders behind the front desk.

On November 9, 2011, two male employees were working the night shift at the hotel – one was at the front desk and the other was elsewhere performing maintenance. At about 3:00 a.m., two young males wearing black clothing, black gloves and white masks covering their entire faces, entered the hotel and jumped across the counter at the front desk. They grabbed the employee from the floor where he had fallen, and dragged him into a hallway behind the desk. One of the men held a gun against the employee's neck while they bound his hands and feet with zip ties.

The men left the employee bound up while they went back to the front desk. After about a minute, they returned and asked him twice where the Disneyland tickets were. They came back into the hallway again, put down their bags or backpacks and put the cash they had taken into the backpacks. The second employee was confronted by the men in the hotel's laundry room. They pointed a gun at him and told

him to get on the floor. After he did so, they also bound his hands and feet with zip ties, while one of the men continued to point a gun at his head.

After the robbers left the building, the first employee freed himself from his restraints and called 911. He described both robbers to the police as being approximately five feet ten inches tall, and weighing about 170 pounds. The second employee described one of the robbers as being about five feet five inches tall, and the other being about five feet seven inches tall. It was later determined that over $56,000 worth of Disneyland tickets had been stolen from the hotel. Disneyland was notified and the tickets were subsequently cancelled.

Three weeks later, defendant, who is six feet two inches tall and weighed 240 pounds at the time of the robbery, visited Disneyland using an annual pass. However, he was accompanied by two others, one of whom attempted to enter the park with a ticket that was rejected by the ticket scanner. Disneyland investigators later determined the rejected ticket had been among those stolen from the hotel during the November 9, 2011, robbery.

Thereafter, defendant's identity was obtained from Disneyland's records of annual passholders. When interviewed by Anaheim police on December 7, defendant identified the two people with him at Disneyland as his friend Derek (later identified as Derek Jesson) and Jesson's girlfriend. He explained that he and Jesson had gone to Chinatown a couple of weeks previously to buy a knife, and Jesson bumped into a friend, Kevin Nguyen, who offered to sell them Disneyland tickets he had obtained from a "supplier." Defendant bought three tickets. When the police officer pointed out, later in the interview, that at the time defendant and his friends had tried to enter Disneyland, they told the Disneyland employees that their tickets had been purchased at the Desert Palms, defendant responded that Nguyen had told them to say that.

The police searched defendant's bedroom where they found three binders containing the stolen tickets, a white mask of the type worn by the robbers, a gun box and

magazine for a .40 caliber Smith and Wesson handgun, and a package of zip ties. There were six zip ties missing from the package, which is the same number used to restrain the hotel employees during the robbery. A search of defendant's car carried out on the same day revealed 20 additional stolen Disneyland tickets, a pair of black and gray gloves, a grey hoodie of the type worn by the robbers, and a Smith and Wesson handgun that appeared to be the same gun visible in a surveillance video from the robbery.

Defendant was arrested and the police searched his cell phone incident to that arrest, including reading the text messages found on it. Defendant was charged with one count of kidnapping to commit robbery (Pen. Code, § 209, subd. (b); all further staturory references are to this code); two counts of robbery (§§ 211, 212.5, subd. (c); one count of false imprisonment by violence (§§ 236, 237, subd. (a); one count of having a concealed firearm in his vehicle (former § 12025, subd. (a)(1), (b)(6), now § 25400, subd. (a)(3); and one count of carrying a loaded, unregistered firearm in public (former § 12031, subd. (a)(1), (a)(2)(F), now § 25850, subds. (a), (c)(6). The information also alleged, in connection with the robbery counts, that defendant personally used a firearm within the meaning of section 12022.53, subdivisions (a) and (b).

The defense hired an investigator, William Hunt, to take photos and measurements of the crime scene and then compare those to the surveillance video taken during the robbery, for the purpose of showing that neither of the robbers shown on the video was the same height as defendant. The hotel operator initially refused Hunt permission to conduct his investigation on the hotel premises, and defendant's counsel obtained a court order allowing Hunt access to the premises. The order was not limited to one day, nor otherwise limited by time.

On January 8, 2015, Hunt went back to the hotel with the court order. After that visit, he wrote a report detailing his preliminary conclusions, but determined he would need to return to the site to take additional photos and measurements so he could ascertain how accurately the surveillance cameras depicted height. Hunt planned to use

himself as a model because he was a similar height to defendant – something he had been unable to do on the first visit because he lacked a ladder and an assistant. On February 3, defense counsel forwarded Hunt's preliminary report to the prosecutor, including Hunt's statement that he wanted to return to the hotel for additional photos of himself standing where the robbers were standing in the surveillance video, prior to his testimony.

On February 4, the prosecutor contacted her own investigator and informed him that Hunt intended to return to the hotel for further investigation. She also told her investigator, incorrectly, that the court order allowing Hunt access to the hotel premises had authorized one visit only. She later explained she had done so because most such orders were limited to a single visit, and she had not read this specific order before detailing its supposed content to her investigator. She also instructed her investigator to go back to the hotel and conduct his own additional investigation.

The prosecutor's investigator called the hotel manager that same day to arrange an additional visit. During that conversation, the investigator also informed the manager that Hunt was also expected to return to the hotel for further investigation, and then volunteered that because the court order allowing Hunt access was no longer in effect, the manager should feel free to refuse Hunt access. Two days later, on February 6, Hunt returned to the hotel premises to complete his investigation, but was refused access.

The prosecutor's investigator went back to the site on February 7 and was able to conduct further investigation, which included taking video. That additional investigation was essentially the same inquiry Hunt had intended to do on his return visit, but had been prevented from doing by the prosecutor. The prosecutor was informed on February 7 that Hunt had returned to the hotel, but was denied access to the site.

Three days later, on February 10, the prosecutor began putting on evidence at the trial. The prosecutor rested her case without calling her investigator as a witness. The defense then called Hunt as its first witness on February 13. Hunt testified about his one site visit, and described some still photographs which he had marked with a line

depicting the top of a lockbox, which established a "relative height of five foot six and five-eighths." When asked if he could estimate "how far away from the wall" two hooded figures were in one of the photographs, he replied "Well, no." And when asked if he was able to make an estimate as to the height of the figures depicted in a photo, he said "it would be a guess." After the prosecutor objected to such a guess, defense counsel terminated his questioning of Hunt.

On cross-examination, the prosecutor asked Hunt whether it appeared to him "not as an investigator, as a lay person," that one of the people in the photos he took appeared to be taller than the lockbox. He responded, "It would appear he may be a little taller." He then agreed the other person appeared to be "quite a bit shorter than the lockbox," but then clarified it was hard to tell from the photos he provided.

After the prosecutor asked Hunt a string of questions about the accuracy of physical descriptions given by the victims, she asked him to clarify "that you were unable to gather any information relating to the angle of this video surveillance camera[?]" He responded, "We were prevented from it" because "[t]he manager would not let me do further than what I did." The prosecutor then asked for a chambers conference to discuss whether Hunt had violated the court's earlier order to "exclude reference to any statements about witness's willingness to cooperate with defense and/or defense investigators."

In the course of discussion in chambers, the court read the order granting Hunt access to the site (which had been issued by a different judge), and noted it had not contained any limitation as to days or time, as was typical of such orders. Although this point was then discussed in some detail, the prosecutor did not mention she had – only just days before – incorrectly told her investigator that although Hunt intended to return to the hotel for further investigation, the prior court order did not authorize it and the hotel manager should feel free to exclude him. Moreover, it was only when the court asked her directly that the prosecutor acknowledged she had already known that Hunt had

returned to the site, but was refused access, when she questioned him about his failure to measure the camera angle. The court consequently ruled it was appropriate for Hunt to respond to that question by stating he had been prevented from further investigation by the hotel manager.

Upon further cross-examination, Hunt stated he was hired primarily to assist in determining the height of the two individuals depicted on the hotel's surveillance camera during the robbery. He explained he had been unable to determine their exact heights, but believed one was slightly taller than the lockbox, while the other was slightly shorter. On redirect, he stated that none of the evidence he was able to review caused him to conclude that the taller of the two robbers could have been as tall as six feet two inches.

Defendant waived his Fifth Amendment right and testified after Hunt. He explained that it was his friend, Jesson, who robbed the hotel. He testified he had become acquainted with Jesson in 2010, when both were enrolled in classes at Golden West College. Prior to the robbery, defendant and Jesson had discussed how such a robbery might be carried out, and defendant provided Jesson with many details about the hotel. However, defendant believed this was just idle chat, and claimed he did not believe Jesson would ever try to rob the hotel, and had no intention of helping him do so.

Defendant claimed he found out about the robbery right after it occurred, when Jesson showed up at his house after 3:00 a.m. that same night. Jesson brought with him a duffle bag containing the tickets and a mask, and defendant then realized he had robbed the hotel. Defendant explained that Jesson did not bring the zip ties with him that night, however. Instead, defendant had asked Jesson at a later date if he could borrow some zip ties, which he used for automotive work. Jesson gave him the package, which defendant had taken home but not used prior to his arrest. Defendant acknowledged that both the gloves and the gun found in his car belonged to him. He described the gloves as typical mechanics gloves, which he used while working on cars. He testified Jesson also

owned a similar gun, and that he and Jesson had gone together to Jesson's property in Temecula to shoot guns at some point before the robbery. Defendant claimed the hoodie found in his car, which appeared to be of the type worn by the robbers, belonged to Jesson, who was wearing it on the night of the robbery and had left it in his car. Defendant said he did not know the identity of the second robber, although he had later asked Jesson who it was.

On cross-examination, defendant agreed he had given Jesson very detailed information about the hotel and its nighttime operation – including the number of employees on the premises, the location of surveillance cameras, how many Disneyland tickets there were, how much cash was on hand, and "exactly where the drawers were." Defendant also conceded that he owned one of the masks used in the robbery – he purchased it at Halloween, just before the robbery – but he explained that Jesson had somehow gotten it from him, and thereafter used it in the robbery.

When asked by the prosecutor if he had been involved in stealing things before, defendant answered "no." But he was then impeached with evidence of a text message sent by his fiancée on October 8, stating, "That stealing bullshit has to stop. You could get caught." Defendant then admitted he had stolen things before the robbery, including shoes and tools.

With respect to the tickets, defendant stated he did not know how many tickets Jesson had brought to him on the night of the robbery, but claimed Jesson had asked him to just "hold on to them." Defendant not only did that, but acknowledged he had tried to sell some of them. On November 17, defendant wrote a text message to a friend named Mario, stating "The tickets work." Mario wrote back, "Congratulations. You are rich. Need to celebrate."

Defendant also admitted that he purchased his gun in October 2011, the month before the robbery. He purchased it in Arizona, on a trip with Jesson and Jesson's father, and he knew it was unregistered.

After defendant's testimony concluded for the day, the jury was sent home and the parties discussed jury instructions with the court. The prosecutor then informed the defense, for the first time, that the prosecutor's investigator would testify on rebuttal, based on his own investigation of the premises on February 7, and that he would be relying on the videotape he had taken that day.

The following day, February 14, the prosecutor left messages for both the hotel manager and defense counsel to "correct[] our prior misinformation about the scope of the court's order [allowing Hunt access to the hotel premises]." She suggested that if Hunt wished to go back and take additional measurements, to "please do so as early as possible."

At the next court session, on February 18, the defense brought a motion for relief based on prosecutorial misconduct. Specifically, the defense argued prosecutorial misconduct based on the prosecutor's interference with the defendant's right to conduct his own further investigation of the premises in accordance with the court's order, and the prosecutor's failure to reveal its own investigator's additional investigation until *after* both the defense investigator and defendant had testified at trial. The defense argued this amounted to sabotage of the defense case. As remedies, the defendant sought (1) dismissal of the case with prejudice, (2) dismissal of the case without prejudice, or (3) suppression of the videotape taken by the prosecutor's investigator when he returned to the hotel premises.

The defense also moved to exclude the videotape on the grounds (1) it had not been disclosed to the defense in a timely fashion, and (2) it was not relevant because the location of the surveillance camera had been moved since the robbery. The court concluded the existence of the videotape was disclosed in a timely fashion because it was rebuttal evidence the prosecutor decided to use only after the defense rested its case. And the court concluded the alteration in the camera angle as compared to the date of the robbery was merely an issue to be hashed out before the jury, and did not render the

videotape irrelevant. The court also believed the videotape actually supported the defense theory that the robbers were shorter than defendant.

With respect to the misconduct assertion, the court did express "great concern" that the prosecutor had "tried to keep out the fact [Hunt was] denied entry" in response to her attempt to impeach his testimony, despite the fact she already knew what had happened, and that she had continued to argue the point in chambers even after the court had read aloud the earlier court order which revealed that her earlier mischaracterization of the order had played a part in Hunt's inability to complete his investigation. However, the court also made clear that while it faulted the prosecutor for making an assumption about the content of a court order without reading it, it also believed she had made an honest mistake when she mischaracterized the scope of the order to her investigator, and that she had not been "playing hide the ball."

Ultimately, the court offered the defense an opportunity to return to the hotel and conduct further investigation – including the creation of its own videotape using the hotel's surveillance camera if it was not satisfied with the prosecution's video – before resting its case.

Defendant resumed the stand and the prosecutor continued her cross-examination. He acknowledged that the story he told to the police following his arrest had been a lie, and that there was no Kevin Nguyen selling Disneyland tickets in Chinatown. He claimed he had told that story because he was trying to protect his friend, Jesson, from being implicated in the hotel robbery. Defendant also conceded that he had told Jesson he would help him sell the tickets after the robbery, but he never actually did it and had no intention of doing it.

After defendant completed his testimony, the defense rested. The prosecutor called her investigator to testify in rebuttal to defense investigator Hunt's testimony about the apparent height of the robbers. The investigator described the circumstances of his visit to the hotel on February 7, 2014, where he obtained a videotape

from the surveillance camera, depicting himself walking around in the places where the robbers had been seen during the robbery. The video was played for the jury and admitted into evidence. Among other things, the investigator testified about how the surveillance camera footage made him appear to be the same height as, or even shorter than, the top of the lockbox Hunt had referred to in his testimony, even though he was five feet eleven inches tall. The defense declined to cross-examine the investigator and chose not to call Hunt as a surrebuttal witness.

The jury convicted defendant on all counts. The court subsequently sentenced him to a life term with the possibility of parole on the aggravated kidnapping count, and a consecutive term of 10 years for the firearm enhancement alleged in connection with that count. The court imposed and stayed punishment on one count of robbery and the count of false imprisonment, and imposed concurrent sentences on the other count of robbery and the two firearm counts. Defendant's total sentence was 10 years, followed by an indeterminate term of life with the possibility of parole.

DISCUSSION

1. Prosecutorial Misconduct

Defendant first argues his conviction must be reversed because the prosecution engaged in egregious misconduct when, after learning that defendant's investigator, Hunt, intended to return to the hotel to conduct further investigation involving the surveillance camera, they misrepresented to the hotel manager that the court order allowing Hunt access had been limited to one day and he was therefore entitled to refuse Hunt further access. And at the same time, the prosecution sent its own investigator to the hotel to conduct the very same investigation Hunt had intended to do, without informing the defense. It was only after Hunt had completed his testimony, and defendant had waived his rights under the Fifth Amendment and begun testifying, that the

prosecution revealed what it had done and acknowledged its role in thwarting Hunt's investigation.

While we agree the prosecution's conduct is disturbing – at a minium, the prosecutor's misrepresentation of the content of a court order was negligent – we conclude it does not justify a reversal of the judgment.

"'"'A prosecutor's misconduct violates the Fourteenth Amendment to the United States Constitution when it 'infects the trial with such unfairness as to make the conviction a denial of due process.' [Citations.] In other words, the misconduct must be 'of sufficient significance to result in the denial of the defendant's right to a fair trial.' [Citation.] A prosecutor's misconduct that does not render a trial fundamentally unfair nevertheless violates California law if it involves 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' [Citations.]"' [Citation.] '*A defendant's conviction will not be reversed for prosecutorial misconduct, however, unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct*.'" (*People v. Tully* (2012) 54 Cal.4th 952, 1009-1010, italics added.)

Defendant's argument stumbles on this last aspect of the analysis. He argues that the prosecutor's misconduct "denied [him] his right to due process of law by preventing the defense from conducting crucial investigation which would have affected the decision whether to rest after the presentation of the prosecution's case." In his reply brief, he claims the prosecution's misconduct was highly prejudicial because "[h]ad the defense been appri[s]ed of the information obtained by the [prosecution] prior to the presentation of the defense case, it would have impacted decisions concerning the testimony of defense witnesses and, indeed, whether or not the defense would have chosen to present the testimony of either Mr. Hunt or [defendant]." However, given the massive pile of circumstantial evidence amassed against defendant, we have no trouble

concluding, even beyond a reasonable doubt, that he would have been convicted had he put on no defense.

Specifically, the prosecution had established: (1) defendant worked at the hotel and he knew about the Disneyland tickets; (2) when he was apprehended, he not only had the stolen tickets in his possession, but also had the mask used in the robbery, the hoodie worn by one of the robbers, and an unregistered gun that appeared to be the one used in the robbery, a bag of twist-ties short the same number as used in the robbery; and (3) the initial story defendant told police about having bought a few of the stolen tickets from a guy in Chinatown was wholly inconsistent with his possession of all those things. Defendant's only hope was to provide the jury with some *other* explanation of those things. The fact that his testimony caused him a host of additional problems is neither here nor there. Without it, he had no chance.

And the fact that defendant might have chosen to omit Hunt's testimony if he had been able to complete his own anticipated investigation before trial – or if he had been privy to the prosecution's last minute videotape – does not change the analysis. There is no indication Hunt's testimony actually hurt the defense and defendant does not explain how omitting that testimony might have altered the outcome of the trial. Significantly, defendant does not argue that Hunt's testimony would have been *improved* in the absence of the prosecutorial misconduct – i.e., that Hunt's initial determination the robbers were shorter than defendant would have been vindicated had the prosecutor not thwarted his attempt to complete his own investigation prior to testifying. Instead, defendant seems to be conceding that ultimately, the surveillance footage was not helpful in establishing the robbers were shorter than he. Given that concession, we could not conclude the defense suffered significant prejudice because Hunt was not allowed to finish his investigation before testifying.

Moreover, we reject defendant's assertion the trail court failed to offer him "any meaningful remedy" after it was revealed the prosecutor had misrepresented the

court order to the hotel manager, and thus interfered with the completion of Hunt's investigation. The remedy offered by the court was that Hunt would be allowed to return to the hotel and complete his investigation using the hotel's own surveillance camera – before the defense rested its case – and thus before the prosecutor would have the opportunity to call her investigator to rebut Hunt's initial testimony with his own surveillance videotape. By doing so, the court ensured the defense would have a chance to give its best version of Hunt's testimony, before the prosecution rebutted anything. That was a meaningful remedy.

Finally, in response to the Attorney General's assertion that defendant could not have been prejudiced by the prosecution's rebuttal videotape because the trial court commented that the tape appeared to actually support defendant's claim the robbers were shorter than he was, we asked the parties to brief the issue of whether the prosecutor had violated her duties under *Brady v. State of Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215], by failing to promptly disclose that videotape to the defendant. However, as the videotape was disclosed to defendant before the defense rested its case, and the court arranged for defendant to conduct his own further investigation of the hotel premises before the videotape was shown to the jury, we conclude no *Brady* violation occurred. (*People v. Wright* (1985) 39 Cal.3d. 576, 591 [No *Brady* violation where the trial court "allow[ed] defendant to present the additional evidence to the jury in a timely manner, so that it could be considered in their deliberations"].) Moreover, as we have already explained, we find defendant suffered no significant prejudice.

2. Kidnapping

Defendant next argues the evidence was insufficient to support his conviction on the count of kidnapping for purposes of robbery – i.e., aggravated kidnapping. Specifically, defendant asserts that the movement of the front desk clerk

from the area behind the desk, into an adjacent hallway, did not constitute sufficient movement to qualify as asportation for purposes of a kidnapping charge.

In reviewing such a challenge, we "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence - -that is, evidence which is reasonable, credible, and of solid value - - such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) We """"presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."""" (*People v. Clark* (2011) 52 Cal.4th 856, 943.) And if the evidence reasonably justifies the trier of fact's findings, reversal is not warranted simply because the evidence might also reasonably be reconciled with a contrary finding. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.)

The standard for asportation in an aggravated kidnapping – referring specifically to a kidnapping carried out "to commit robbery, rape" or other specified offenses (§ 209, subd. (b)(1)) – focuses on the movement's relationship to the other crime. The standard "requires movement of the victim that is not merely incidental to the commission of the underlying crime and that increases the risk of harm to the victim over and above that necessarily present in the underlying crime itself." (*People v. Martinez* (1999) 20 Cal.4th 225, 232; see § 209, subd. (b)(2).) The two elements of this test "are not mutually exclusive, but interrelated," (*People v. Rayford* (1994) 9 Cal.4th 1, 12 (*Rayford*)) and the standard "suggests a multifaceted, qualitative evaluation rather than a simple quantitative assessment." (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1152.) Significantly, "whether the victim's forced movement was merely incidental to the [underlying crime] is necessarily connected to whether it substantially increased the risk to the victim." (*Ibid*.)

In assessing whether the movement increases the risk of harm to the victim over and above that present in the robbery itself, the trial court considers "such factors as

the decreased likelihood of detection, the danger inherent in the vicitm's forseeable attempts to escape, and the attacker's enhanced opportunity to commit additional crimes." (*Rayford, supra*, 9 Cal.4th at p. 13.)

Defendant relies on *People v. Hoard* (2002) 103 Cal.App.4th 599 (*Hoard*), in which the trial court concluded that moving jewelry store employees into a back office, where they were restrained while the defendant robbed the store did not qualify as an aggravated kidnapping. Not only did the *Hoard* court conclude the movement of the employees had been merely incidental to the robbery, but it specifically rejected the notion that confining the employees had increased the risk of harm to them: "a rape victim is certainly more at risk when concealed from public view and therefore more vulnerable to attack. But in the present case, the victims may have been at less risk tied up in the back office where they could not try to thwart the robbery than had they remained at gunpoint in the front of the store." (*Id.* at p. 607.) Similarly, the court rejected the notion that moving the employees to the back office for a brief period subjected them to a substantial increase in the risk of psychological harm, over and above what would be expected from a stationary robbery. In doing so, the court contrasted that situation to the one found in *People v. Nguyen* (2000) 22 Cal.4th 872, where "the victim was moved to five different locations over a period of hours, not 50 feet for a few minutes." (*Hoard*, at p. 607.)

We agree the facts of *Hoard* are most closely analogous to the present case, and its reasoning is persuasive. Moreover, the Attorney General's effort to distinguish it fails. The Attorney General argues that because defendant had already ordered the desk clerk onto the floor behind the front desk, it was consequently unnecessary to move him any farther to carry out the robbery. But that assertion is immediately undermined by the acknowledgment that the cash and Disneyland tickets the robbers sought were stored behind the front desk; hence, if the desk clerk were not moved out of the immediate area, defendant and his cohort would have had to step over and around him to conduct their

search. In these circumstances, as in *Hoard*, moving the desk clerk "served only to facilitate the crime with no other apparent purpose." (*Hoard, supra*, 103 Cal.App.4th at 607.)

The Attorney General's contention that moving the desk clerk into the hallway subjected him to an increased risk of physical or psychological harm is likewise unavailing. Specifically, the mere fact the clerk "was out of public view and away from the surveillance cameras" did not demonstrate either that the crime was less likely to be detected that the clerk was in greater peril. As to the former, the robbery was being carried out by men dressed in black hoodies and white masks. If anyone had entered or even looked into the hotel lobby while the robbery was in progress, they would have realized what was happening without regard to whether the clerk was also visible in the lobby. And because there is no evidence the surveillance cameras were being *monitored* during the robbery, the clerk's appearance on the screen would not have affected the likelihood of detection. And as to the latter, there is simply no basis to infer that remaining in the lobby with the armed robbers would have been safer for the clerk than remaining in the hallway, out of any potential line of fire.

The Attorney General also argues that the movement of the desk clerk into the hallway subjected him to an increased risk of psychological harm because "his seclusion exacerbated the mental anguish," but cites no evidence to support it. "The essence of aggravated kidnapping is the increase in the risk of harm to the victim *caused by the forced movement*." (*People v. Dominguez, supra*, 39 Cal.4th at p. 1152, italics added.) And yet when the desk clerk was asked if he was "afraid for your life" during the robbery, he made no reference to being moved into the hallway. Instead, he made clear it was the gun and the restraints that caused him to feel that way: "Definitely. It's a gun. It's a gun pointed straight at your head while they're zip-tying you."

Finally, the Attorney General cites *People v. Corcoran* (2006) 143 Cal.App.4th 272, suggesting it is more on point. We cannot agree. In *Corcoran*, the

defendants were attempting to rob a bingo hall, and it was only *after* they abandoned that plan because one of the victims had escaped, that "[a]t gunpoint, they herded the victims approximately 10 feet from a public area to a small back office without windows and with a solid door. Believing that [another victim] was trying to call the police, defendant pulled what he believed to be a telephone cord out of the wall. He threatened to shoot the victims if they left the office." (*Id*. at p. 279, fn. omitted.) The court reasoned that because the attempted robbery had already been aborted when the victims were moved into the office, and because the would-be robbers engaged in additional menacing acts while holding the victims in the office, the movement was not merely incidental to the attempted robbery and had increased the risk of danger to the victims. "In the instant case, the movement of the victims had nothing to do with facilitating taking cash from the bingo hall; defendant and his accomplice had aborted that aim, and their seclusion of the victims in the back office under threat of death was clearly 'excess and gratuitous.'" (*Id*. at pp. 279-280.) Significantly, *Corcoran* did not disagree with *Hoard*, but instead distinguished it on that basis. (*Id.* at p. 280.) This case is factually on point with *Hoard*, and is thus distinguishable on that basis as well.

Consequently, we conclude there is no substantial evidence to support defendant's conviction for aggravated kiddnapping, and the conviction must be reversed.

3. Cell Phone Search

Relying on *Riley v. California* (2014) 513 U.S. ___ [134 S.Ct. 2473, 189 L.Ed.2d 430] defendant also claims his Fourth Amendment right to be free of unreasonable searches and seizures was violated when the police searched his cell phone, without a warrant, at the time of his arrest. In *Riley*, the United States Supreme Court concluded that the rule allowing police to search and seize physical items under an arrestee's immediate control did not extend to a search of *the contents* of a cell phone. Defendant acknowledges that *Riley* was decided after his trial, but argues it states a

constitutional rule of criminal procedure that applies retroactively to pending cases such as this, and thus it demonstrates that the text messages uncovered during the search of his cell phone should have been suppressed under the exclusionary rule. He consequently asserts it was error to allow them to be relied upon at trial.

Defendant also acknowledges he made no objection to the prosecutor's use of the text messages at trial, but argues the issue is not waived because it would have been futile to object in light of then-controlling California law (see *People v. Diaz* (2011) 51 Cal.4th 84, abrogated by the holding in *Riley*), which specifically approved such searches without a warrant.

The Attorney General seems to agree with much of defendant's argument, with one crucial exception: she asserts that because the police conducted the search of defendant's cell phone in good faith and in full compliance with then-applicable California law, there was no basis to suppress the evidence. The Attorney General has the better of this issue.

The exclusionary rule is remedial, and its application to suppress evidence is not warranted in every case where the Fourth Amendment has been violated. "[T]he exclusionary rule 'operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect. [Citations.]' [Citation.] Thus, its '"'prime purpose"' is to '"effectuate"' the Fourth Amendment's guarantee against unreasonable searches or seizures by 'deter[ring] future unlawful police conduct.' [Citation.] Moreover, because the exclusionary rule is a 'remedial device,' its application is 'restricted to those situations in which its remedial purpose is effectively advanced.' [Citation.] Thus, application of the exclusionary rule '"is unwarranted"' where it would '"not result in appreciable deterrence."'" (*People v. Willis* (2002) 28 Cal.4th 22, 30.) More specifically, "exclusion is proper '"*only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional. . . .*"'" (*Id.* at p. 31, italics added.)

Here, there can be no persuasive claim that the police who searched defendant's cell phone could be charged with knowledge that the search was unconstitutional. To the contrary, at the time of that search, our controlling Supreme Court precedent expressly *allowed* such searches. Defendant suggests there were some indications – in the form of case law in other states, and proposed legislation in this one – that our Supreme Court's approval of such searches was on shaky ground, but that is not an evaluation we require police officers to engage in. Rather, we expect them to follow the law *as it exists*. And at the time of defendant's arrest in this case, our law allowed his cell phone to be searched. Consequently, there is no basis for applying the exclusionary rule to deter police officers from engaging in the conduct exhibited by the officers in this case.

4. Instructional Error

Finally, defendant also claims instructional error. He argues the court erred by instructing the jury with CALCRIM No. 376, as follows: "If you conclude that the defendant knew he possessed property and you conclude the property had in fact been recently stolen, you may not convict the defendant of the kidnapping for robbery, as charged in count 1, and second-degree robbery, as charged in count[s] 2 and 3, based on those facts alone. However, if you also find supporting evidence tends to prove his guilt, then you may conclude that the evidence is sufficient to prove that he committed the kidnapping for robbery, as charged in count 1, and the second-degree robbery, as charged in counts 2 and 3. [¶] The supporting evidence need only be slight and need not be enough by itself to prove guilt. You may consider how, where, and when the defendant possessed the property along with other relevant circumstances tending to prove his guilt of kidnapping for robbery, as charged in count 1, and second-degree robbery, as charged in counts 2 and 3. [¶] Remember that you may not convict the defendant of any crime

unless you are convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt."

Much like its predecessor, CALJIC No. 2.15, CALCRIM No. 376 is based on a "long-standing rule of law [that] allows a jury to infer guilt of a theft-related crime from the fact a defendant is in possession of recently stolen property when coupled with slight corroboration by other inculpatory circumstances [that] tend to show guilt." (*People v. Barker* (2001) 91 Cal.App.4th 1166, 1173.) However, defendant contends this instruction denied him due process because it invited the jury to infer he was a perpetrator of the robbery based on only "slight" evidence, and thus "permitted an inference of guilt without a rational basis."

The Attorney General responds that defendant waived this issue by failing to object to this standard instruction at the time it was given, citing *People v Hart* (1999) 20 Cal.4th 546. We reject the waiver argument because the rule cited by the Attorney General applies to claims that the trial court erred by failing to "modify or amplify" a standard instruction. As explained in *Hart*, "a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*Id.* at p. 622.) But that is not what defendant asserts here. He is not arguing that CALCRIM No. 376 should have been modified to fit this case; rather, his claim is that the instruction is not correct in law because it invites the jury to infer a defendant's guilt without sufficient evidentiary basis to support it. *Hart* does not preclude such a claim being made for the first time on appeal. Instead, because "the issue raised asserts a violation of substantial constitutional rights" (*People v. O'Dell* (2007) 153 Cal.App.4th 1569, 1574), it may be considered on appeal even if not objected to the trial level.

On the merits, however, defendant's argument fails. As defendant acknowledges, other courts have already rejected similar challenges to both CALCRIM No. 376 and its predecessor, CALJIC No. 2.15. (See, e.g., *People v. Parson* (2008) 44

Cal.4th 332, 355-356 ["nothing in the instruction that directly or indirectly addresses the burden of proof, and nothing in it relieves the prosecution of its burden to establish guilt beyond a reasonable doubt]; *People v. O'Dell, supra*, 153 Cal.App.4th at pp. 1573-1574; *People v. Williams* (2000) 79 Cal.App.4th 1157, 1173 ["As long as the corroborating evidence together with the conscious possession could naturally and reasonably support an inference of guilt, and that inference is sufficient to sustain a verdict beyond a reasonable doubt, we discern nothing that lessens the prosecution's burden of proof or implicates a defendant's right to due process"].)

Despite that acknowledgment, defendant contends it was error to give the instruction here because it allowed the jury to improperly "infer from [his] possession of the stolen tickets that he was a participant in the kidnapping and robbery based only on slight support in the evidence." He further contends that because the "slight supporting evidence was negated by [his] testimony, the instruction should not have been given." Defendant's first point distorts CALCRIM No. 376. The instruction does not *allow the jury to convict* based on slight supporting evidence; what it actually does is *prevent the jury from convicting* if the *only* evidence is his knowing possession of the stolen goods. As explained in *People v. Williams, supra,* 79 Cal.App.4th at p. 1173 (discussing the predecessor statute) "CALJIC No. 2.15 correctly prohibits the jury from drawing an inference of guilt solely from conscious possession of recently stolen property but properly permits the jury to draw such an inference where there is additional corroborating evidence." Defendant is not denied due process by a jury instruction which limits the jury's ability to convict him.

And defendant's second point implies that the mere fact he testified obligated the court to presume he was telling the truth – and thus to disregard any contradictory evidence that otherwise tended to support his guilt. Of course there is no such rule. The mere fact defendant's testimony offered a different explanation for the

supporting evidence did not "negate" that evidence. Instead, it was for the jury to decide whether his testimony was credible.

DISPOSITION

The judgment is reversed to the extent of defendant's conviction on the count of aggravated kidnapping, but otherwise affirmed. The case is remanded to the trial court with instructions to resentence defendant.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

ARONSON, J.